No. 10-864

In the Supreme Court of the United States

BILL HARBERT INTERNATIONAL CONSTRUCTION, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
DOUGLAS N. LETTER
STEVE FRANK
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

In May 2009, Congress amended the False Claims Act (FCA), 31 U.S.C. 3729 *et seq.* See Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, 123 Stat. 1617. As relevant here, Congress added a new provision, 31 U.S.C. 3731(c) (Supp. III 2009), which states that "[i]f the Government elects to intervene" and "file its own complaint" in a *qui tam* action, "any such Government pleading shall relate back to the filing date" of the relator's complaint under certain circumstances. Congress further provided that the FCA's new relation-back provision "shall apply to cases pending on the date of enactment." FERA § 4(f)(2), 123 Stat. 1625. Because this *qui tam* action was pending before the court of appeals at the time of the 2009 amendments, the court applied the relation-back provision and determined that some (but not all) of the government's claims were timely. The court rejected petitioners' argument that the relation-back provision applies only to cases in which the government intervened after May 2009. The question presented is as follows:

Whether the court of appeals correctly held that the relation-back provision applies to the government's complaint in intervention in this suit.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 9
Conclusion 19

TABLE OF AUTHORITIES

Cases:

Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) 11
Calder v. *Bull*, 3 U.S. (3 Dall.) 386 (1798) 8
Caminetti v. *United States*, 242 U.S. 470 (1917) 13
Clark v. *Martinez*, 543 U.S. 371 (2005) 16
Collins v. *Youngblood*, 497 U.S. 37 (1990) 18
Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 18
Eastern Enters. v. *Apfel*, 524 U.S. 498 (1998) 18
FCC v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) 18
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 11
Hudson v. *United States*, 522 U.S. 93 (1997) 8, 19
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994) 17
Major League Baseball Players Ass'n v. *Garvey*, 532 U.S. 504 (2001) 12
NCAA v. *Smith*, 525 U.S. 459 (1999) 18
Seling v. *Young*, 531 U.S. 250 (2001) 19
Smith v. *Doe*, 538 U.S. 84 (2003) 19

Cases—Continued: Page

United States v. *Bestfoods*, 524 U.S. 51 (1998) 18
United States v. *Rogan*, 517 F.3d 449 (7th Cir. 2008) 19
United States v. *Ron Pair Enters.*, 489 U.S. 235 (1989) 13
United States ex rel. Eisenstein v. *City of N.Y.*, 129 S. Ct. 2230 (2009) 2, 19
VMI v. *United States*, 508 U.S. 946 (1993) 11

Constitution, statutes and rules:

U.S. Const.:
Art. I, § 9, Cl. 3 (Ex Post Facto Clause) 8, 18, 19
Amend. V:
Due Process Clause 8, 18
Just Compensation Clause 8, 18
False Claims Act, 31 U.S.C. 3729 *et seq.* 2
31 U.S.C. 3729(a) 5
31 U.S.C. 3729(a)(1) 2
31 U.S.C. 3730(a) 2, 19
31 U.S.C. 3730(b) 19
31 U.S.C. 3730(b)(1) 2
31 U.S.C. 3730(b)(2) 2, 14, 15
31 U.S.C. 3730(b)(3) 2, 15
31 U.S.C. 3730(c)(3) 2
31 U.S.C. 3730(d)(1) 2
31 U.S.C. 3731(b) 19
31 U.S.C. 3731(b)(1) 3, 6

Statutes and rules—Continued: Page

31 U.S.C. 3731(b)(2) 3
31 U.S.C. 3731(c) (Supp. III 2009) ..... *passim*
Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 3
§ 4(b)(3), 123 Stat. 1623 ..... 3, 9
§ 4(f)(2), 123 Stat. 1625 ..... 4, 7, 9, 13, 16, 17
Fed. R. App. P. 4(a)(1)(A) 19
Fed. R. Civ. P.:
Rule 15 ..... 12, 15
Rule 15(c)(1) 6
Rule 15(c)(1)(B) 12
Rule 15(c)(2) 6

Miscellaneous:

Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2007) 11

In the Supreme Court of the United States

No. 10-864

BILL HARBERT INTERNATIONAL CONSTRUCTION, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-83a) is reported at 608 F.3d 871. The opinion of the district court (Pet. App. 84a-236a) is reported at 505 F. Supp. 2d 1.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2010. A petition for rehearing was denied on October 1, 2010 (Pet. App. 272a-273a). The petition for a writ of certiorari was filed on December 30, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, provides for the imposition of civil penalties and treble damages against any person who, *inter alia*, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government * * * a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1). The Attorney General may bring a civil action if he finds that a person has committed a violation. 31 U.S.C. 3730(a). Alternatively, a private person (known as a relator) may bring his own suit (commonly referred to as a *qui tam* action) "for the person and for the United States Government." 31 U.S.C. 3730(b)(1); see *United States ex rel. Eisenstein* v. *City of N.Y.*, 129 S. Ct. 2230, 2232 (2009). If a *qui tam* action results in the recovery of damages or civil penalties, the award is divided between the government and the relator. 31 U.S.C. 3730(d)(1).

If a relator brings a *qui tam* action, the complaint is initially filed under seal and served upon the government, together with "substantially all material evidence and information the [relator] possesses." 31 U.S.C. 3730(b)(2). "The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information," *ibid.*, and the district court may extend the 60-day period upon a showing of good cause, 31 U.S.C. 3730(b)(3). If the government declines to intervene, the relator "shall have the right to conduct the action," but the district court "may nevertheless permit the Government to intervene at a later date upon a showing of good cause." 31 U.S.C. 3730(c)(3).

b. This case concerns the FCA's statute of limitations. A civil action under the FCA may not be brought

> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. 3731(b)(1) and (2).

In May 2009, while this lawsuit was pending before the court of appeals, Congress amended the FCA. See Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, 123 Stat. 1617. As relevant here, Congress specified that, for statute-of-limitations purposes, claims brought by the government in a *qui tam* action may relate back to earlier claims brought by the relator based on the same conduct or events. Congress provided that

> [i]f the Government elects to intervene and proceed with an action brought under 3730(b), the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the com-

> plain . of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

31 U.S.C. 3731(c) (Supp. III 2009); see Pet. App. 278a-279a. Congress further provided that the new Section 3731(c) "shall apply to cases pending on the date of enactment." FERA § 4(f)(2), 123 Stat. 1625.

2. Following the 1978 Camp David Accords, the United States agreed to provide economic assistance to Egypt, including funding to improve the sewer systems in Cairo and Alexandria, through the United States Agency for International Development (USAID). The sewer projects were divided into numerous construction contracts and put out for bidding by contractors prequalified by the USAID. Pet. App. 3a.

In 1995, Richard Miller filed a *qui tam* complaint under the FCA. At the time, Miller was a Vice President of the J.A. Jones Construction Company (Jones), which had partnered with Harbert International, Inc. (HII) in a series of identical joint ventures that had bid on three of the sewer projects. Miller alleged that, in the course of his employment, he had discovered that Jones, HII, and several related corporations had conspired to rig the bidding on the sewer projects in the late 1980s and the 1990s. Miller's complaint focused on one particular contract, Contract 20A, but it alleged that the defendants had conspired to rig the bidding on other contracts as well. Pet. App. 4a-5a, 9a.

As required by the FCA, Miller filed his complaint under seal. Shortly after Miller filed his complaint, the government opened a criminal investigation into the

conspiracy, and it then filed successive motions in this case to keep Miller's complaint sealed in order to prevent interference with the ongoing investigation. The government ultimately prosecuted many of the participants in the Cairo and Alexandria bid-rigging arrangements, obtaining convictions of at least five United States corporations or individuals, including one of the defendants in this case (Roy Anderson). Pet. App. 4a-5a.

In 2001, Miller's complaint was unsealed and the government filed its own complaint in intervention, taking over control of the case. The government alleged that numerous defendants, including petitioners, had participated in the Cairo and Alexandria bid-rigging schemes. The government's complaint adopted Miller's claims with respect to Contract 20A, but it also added claims with respect to Contracts 07 and 29, which the government characterized as part of the same conspiracy. Miller then amended his complaint to add claims related to Contracts 07 and 29. After six years of pleadings, motions, and discovery, trial began in March 2007. Following seven weeks of testimony, the jury found for Miller and the government on every count. Pet. App. 5a-8a.

The jury further found that the United States had suffered approximately $34 million in damages from petitioners' conduct. As required by the FCA, the district court trebled those damages and added statutory penalties. See 31 U.S.C. 3729(a). After subtracting amounts previously recovered by the United States, the court awarded $90.4 million in damages. Petitioners moved for judgment notwithstanding the jury's verdict on a variety of issues and sought a new trial on others. Rejecting petitioners' legal arguments and finding the

jury's verdict to be supported by the evidence, the district court denied all of petitioners' motions. Pet. App. 8a; see *id.* at 84a-236a (district court opinion). *Inter alia*, the district court held, approximately 11 months before the 2009 FCA amendments were enacted, that the government's complaint in intervention was timely because it related back to Miller's sealed complaint pursuant to Federal Rule of Civil Procedure 15(c)(1) and (2). See *id.* at 219a n.137.

3. The court of appeals affirmed in part and vacated and remanded for a new trial in part. Pet. App. 1a-83a.

a. The court of appeals first held that both Miller's and the government's claims concerning Contract 20A were timely. Pet. App. 9a-14a. The court recognized that the FCA's statute of limitations precludes a civil action filed "more than 6 years after the date on which the violation * * * [was] committed." 31 U.S.C. 3731(b)(1). The court reasoned that the claims concerning Contract 20A in Miller's original complaint were timely because that complaint was filed in 1995, less than six years after the alleged Contract 20A violations. Pet. App. 9a.

The court of appeals also concluded that the government's claims concerning Contract 20A were timely because those claims "relate[d] back to Miller's timely filed complaint." Pet. App. 10a. The court explained that "[a]t the time of trial the FCA did not by its terms address relation back," but "[i]n 2009, after trial but before this appeal was briefed, the Congress amended the FCA expressly to provide for relation back." *Ibid.* As amended, the FCA provides that

> [f]or statute of limitations purposes, [a] Government pleading shall relate back to the filing date of the

> complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

Id. at 11a (quoting 31 U.S.C. 3731(c) (Supp. III 2009)). Because petitioners did not argue that "the scope of the Government's claims concerning Contract 20A impermissibly expands beyond that of Miller's," the court held that "the Government's claims concerning Contract 20A are not barred by the statute of limitations because they relate back to Miller's original timely complaint." *Id.* at 13a-14a.

The court of appeals rejected petitioners' argument that the relation-back provision does not apply to this case. The court observed that "[a]lthough most of the 2009 amendments to the FCA apply only 'to *conduct* on or after the date of enactment,' the provision permitting relation back was made expressly 'appl[icable] to cases pending on the date of enactment.'" Pet. App. 11a (quoting FERA § 4(f)(2), 123 Stat. 1625) (brackets in original). Petitioners argued "that Congress intended to limit the effect of the statute to cases in which the Government ha[d] not yet intervened" when the 2009 amendments were enacted. *Id.* at 12a. The court of appeals rejected that contention, explaining that "the effective date of the provision concerning relation back is not limited in scope to a particular type of case or subset of cases." *Ibid.*; see *ibid.* ("We have no need to draw inferences * * * when the statute is clear on its face.").

The court of appeals also found "unpersuasive" petitioners' arguments "that the amended statute cannot constitutionally be applied to this case." Pet. App. 11a.

The court explained that "[t]he *Ex Post Facto* Clause of the Constitution applies only to penal legislation," *ibid.* (citing *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390-391 (1798)), and that "[t]he FCA is not penal," *ibid.* (citing *Hudson* v. *United States*, 522 U.S. 93, 100-103 (1997)). The court declined to address petitioners' "arguments concerning the Takings and the Due Process Clauses of the Constitution because they were raised in only two conclusory sentences." *Ibid.*

b. The court of appeals agreed with petitioners, however, that the government's and Miller's claims concerning Contracts 07 and 29 were not timely. Pet. App. 14a-19a. The court concluded that the government's claims could not relate back to Miller's original complaint because "the Government's claims concerning Contracts 07 and 29 * * * have little to do with Miller's claims concerning Contract 20A." *Id.* at 14a; see *id.* at 17a ("[A]ll three contracts are similar only in that each was funded by the USAID and required work related to sewer systems in Egypt."). The court held that Miller's claims regarding Contracts 07 and 29 were time-barred "because he added them after the limitation period had run" and "Miller may not take advantage of the relation back provision in the FCA, which applies only to the Government's pleadings." *Id.* at 19a.

c. The court of appeals further held that petitioners had been unfairly prejudiced by the government's use of evidence and argument that contradicted a pretrial stipulation, see Pet. App. 31a-34a, and other evidence and argument commenting upon petitioners' wealth, see *id.* at 37a, 49a-53a. Based on that holding, the court vacated the district court's judgments and remanded for a new trial. *Id.* at 34a, 53a.

d. Judge Tatel dissented in part. Pet. App. 72a-83a. He agreed with the panel majority that Miller's and the government's claims on Contract 20A were timely. He would have held, however, that the government's claims on Contracts 07 and 29 were also timely because they arose from the same overarching conspiracy and therefore related back to Miller's original complaint. *Id.* at 72a-79a. Judge Tatel also would have held that the district court did not abuse its discretion in declining to grant a new trial. See *id.* at 79a-82a.

ARGUMENT

In May 2009, Congress amended the FCA to provide that "[i]f the Government elects to intervene" and "file its own complaint" in a *qui tam* action, "any such Government pleading shall relate back to the filing date" of the relator's complaint under certain circumstances. FERA § 4(b)(3), 123 Stat. 1623. Congress expressly provided that the FCA's new relation-back provision "shall apply to cases pending on the date of enactment." § 4(f)(2), 123 Stat. 1625. Properly understood, that provision did not change the applicable law, but simply confirmed the rule adopted by the majority of lower courts before the 2009 amendments were enacted.

Because this *qui tam* action was pending at the time of the 2009 amendments, the court of appeals applied the relation-back provision to determine the timeliness of the government's claims. The court therefore rejected petitioners' argument that the relation-back provision applies only to cases in which the government intervenes after May 2009. The decision below is correct and does not conflict with any decision of this Court

or of any other court of appeals. Further review is not warranted.

1. a. As a threshold matter, it is not clear how petitioners have been harmed by the court of appeals' decision to apply the relation-back provision, 31 U.S.C. 3731(c), to this case. The government and relator Miller brought claims concerning three contracts: Contracts 07, 20A, and 29. The court of appeals agreed with petitioners that, even under Section 3731(c), the government's and Miller's claims concerning Contracts 07 and 29 are time-barred. Pet. App. 14a-19a; see Pet. 7 n.1 ("The Court of Appeals held, however, that the claims as to 07 and 29 did not relate back, even under FERA."). Accordingly, the only claims that remain at issue are those by the government and Miller concerning Contract 20A.

The court of appeals held that the government's claims on Contract 20A are timely because they relate back to Miller's original complaint under Section 3731(c). That ruling, however, is of little or no practical consequence in this case because the court also held—and petitioners do not dispute—that Miller's claims concerning Contract 20A are timely without the benefit of Section 3731(c). Pet. App. 10a. Moreover, petitioners did not argue that "the scope of the Government's claims concerning Contract 20A impermissibly expands beyond that of Miller's." *Id.* at 13a. As a result, it does not matter whether the government's claims on Contract 20A are timely under Section 3731(c). Miller's claims on Contract 20A will proceed to trial on remand without regard to Section 3731(c), and the government's claims

on Contract 20A, whether or not timely, are substantially the same as Miller's indisputably timely claims.[1]

b. Even if the court of appeals' application of Section 3731(c) could be expected tangibly to affect the conduct of the proceedings on remand, the interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *VMI* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari) (noting that this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction"); *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 281 n.63 (9th ed. 2007).

As petitioners acknowledge, the court of appeals "granted [them] new trials as to [Contract] 20A based on evidentiary errors." Pet. 7 n.1; see Pet. App. 31a-34a, 37a, 49a-53a; p. 8, *supra*. If petitioners prevail on remand, further consideration of their current claims will be unnecessary. If petitioners are again found liable and the judgment against them is affirmed on appeal,

---

[1] The government's complaint in intervention, unlike relator's complaint, raised common law claims in addition to its FCA claim. Petitioners do not address those common law claims. See, *e.g.*, Pet. 8 ("[T]his case squarely presents the question whether the Constitution allows Congress to resuscitate the government's time-barred *FCA claims*.") (emphasis added). Specifically, petitioners do not argue that the government's common law claims impermissibly expand the scope of Miller's claims on Contract 20A. In any event, the government's common law claims arise from the same wrongful conduct by petitioners, and thus their litigation will not tangibly affect the proceedings on remand.

they can raise those claims, together with any additional issues that might arise upon retrial, in a new petition for certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) ("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals."). Review by this Court at the present stage of the litigation therefore would be premature.

2. The decision below is correct and does not conflict with any decision of this Court or of any other court of appeals.

a. Section 3731(c) provides that "[i]f the Government elects to intervene" and "file its own complaint" in a *qui tam* action, "any such Government pleading shall relate back to the filing date" of the relator's complaint, to the extent that the government's claims arise from the same conduct or events as the relator's claims. Section 3731(c) thus ensures that when the government elects to assume control of a *qui tam* action, the government can file timely pleadings that relate back to the relator's original complaint. Under Federal Rule of Civil Procedure 15, a relator can file an amended complaint "assert[ing] a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). Section 3731(c) ensures that when the government steps into a relator's shoes, it has the same power to make amendments "aris[ing] out of the conduct, transactions, or occurrences set forth, or attempted to be set forth," in the prior complaint of [the relator]." 31 U.S.C. 3731(c) (Supp. III 2009).

Nothing in Section 3731(c) itself imposes temporal limits on the range of *qui tam* actions to which the provision applies. Section 3731(c) states that "[i]f the Government elects to intervene and proceed" with a *qui tam* action, "the Government may file its own complaint or amend the complaint of [the relator]." Congress recognized that the government may wish to file its own pleadings in order "to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief." 31 U.S.C. 3731(c) (Supp. III 2009). Congress therefore specified that when the government files its own pleadings in a *qui tam* action in which it has intervened, "*any such Government pleading shall relate back* to the filing date" of the relator's complaint, provided that the government's claims arise out of the same conduct or events as the relator's complaint. *Ibid.* (emphasis added).

Although Section 3731(c) itself does not specify the range of suits to which it applies, a different provision of the 2009 amendments squarely resolves that question, stating without qualification that Section 3731(c) "shall apply to cases pending on the date of enactment." FERA § 4(f)(2), 123 Stat. 1625. Congress thus unambiguously declined to limit Section 3731(c)'s application in the manner that petitioners advocate. Because this case was "pending on the date of enactment" of Section 3731(c), the court of appeals correctly applied that provision to determine the timeliness of the government's claims in this *qui tam* action. See, *e.g.*, *United States* v. *Ron Pair Enters.*, 489 U.S. 235, 241 (1989) ("[W]here, as here, the statute's language is plain, 'the sole function of the

courts is to enforce it according to its terms.'") (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)).

b. The decision below does not conflict with any decision of another court of appeals, and petitioners do not contend that such a conflict exists. Petitioners instead argue that district courts "addressing FERA's supposed retroactivity are coming to opposite conclusions." Pet. 19. Petitioners rely, however, on district court decisions concerning a different 2009 amendment with different language. As petitioners acknowledge, that other amendment to Section 3729(a)(1) is "not directly implicated here." *Ibid.* With respect to the amendment to Section 3731(c) that is at issue in this case, petitioners do not identify any division of authority even among district courts.

c. The question presented concerns the applicability of Section 3731(c) to FCA *qui tam* suits in which the government intervened before May 2009, when the relevant FCA amendments became law. That question by its nature will diminish in importance with the passage of time.

d. Even if Section 3731(c) did not apply to this case, the court of appeals would still have been correct to hold that the government's complaint with respect to Contract 20A related back to the date the relator's complaint was filed. Properly understood, Section 3731(c) did not change the law governing relation back in FCA *qui tam* suits, but simply confirmed what had previously been the majority view among the lower courts—*i.e.*, that when the government "elect[s] to intervene and proceed with" a pending *qui tam* action, 31 U.S.C. 3730(b)(2), the government effectively stands in the relator's shoes, and its complaint should therefore relate

back to a timely relator's complaint. Indeed, before the 2009 amendments were enacted, the district court held in this case that the government's claims concerning Contract 20A could relate back to Miller's original complaint under Federal Rule of Civil Procedure 15. Pet. App. 10a, 219a n.137; see p. 6, *supra*. Even if Section 3731(c) did not apply to this case, the FCA's statute of limitations would bar the government's complaint with respect to Contract 20A only if that district court holding were overturned.

3. a. Petitioners' various arguments for a different interpretation of the statute lack merit. Petitioners contend that Section 3731 permits relation-back only in "*qui tam* actions that [had] been filed under seal but as to which the government had not yet decided to intervene in May 2009." Pet. 29. Petitioners derive that limitation from the first sentence of Section 3731(c), which states that "[i]f the Government elects to intervene and proceed with [a *qui tam* action], the Government may file its own complaint or amend the complaint of [the relator]." Petitioners argue (Pet. 29-30) that, by using the present tense "elects" and "may file," Congress expressed its intent to permit relation-back only in cases in which the government had not yet intervened at the time of the 2009 amendments.

That is not a plausible reading of the statutory text. The first sentence of Section 3731(c) simply restates authority that the government possessed before Section 3731(c)'s enactment. Under other provisions of the FCA, it has long been the case that "[t]he Government may elect to intervene and proceed" with a relator's *qui tam* action. 31 U.S.C. 3730(b)(2); see 31 U.S.C. 3730(b)(3). The first sentence of Section 3731(c) recognizes that longstanding practice in *qui tam* actions by

stating that "[i]f the Government elects to intervene and proceed * * *, the Government may file its own complaint or amend the [relator's] complaint." That is what the government did here; it filed its own complaint when it intervened in 2001. Pet. App. 5a. The first sentence of Section 3731(c) thus defines the set of pleadings to which the provision applies: complaints filed by the government in *qui tam* actions in which it has intervened.

The second sentence of Section 3731(c) then clarifies that "[f]or statute of limitations purposes, any such Government pleading shall relate back to the filing date" of the relator's complaint under certain circumstances. When Section 3731(c) requires relation-back for "any such Government pleading," it is referring to the set of pleadings described in the previous sentence: complaints filed by the government in *qui tam* actions in which it has intervened. On its face, Section 3731(c) does not limit relation-back to government pleadings filed in cases in which the government has intervened after May 2009. And, as explained above, Congress defined the temporal scope of Section 3731(c)'s coverage in a separate provision, which makes Section 3731 applicable to all "cases pending on the date of enactment." FERA § 4(f)(2), 123 Stat. 1625.[2]

---

[2] Petitioners' reliance (Pet. 30) on the canon of constitutional avoidance is misplaced. That canon is "a tool for choosing between competing *plausible* interpretations" of a statute, *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005) (emphasis added), and petitioners' interpretation is not plausible for the reasons set forth in the text. In any event, the canon applies only when a competing plausible interpretation of a statute raises "serious constitutional doubts." *Ibid.* As explained below, the court of appeals' interpretation of the statute does not raise any constitutional doubts, let alone any serious ones. See pp. 17-19, *infra*.

b. Petitioners also contend (Pet. 25-28) that application of Section 3731(c) to this case runs afoul of the presumption that federal statutes do not apply retroactively. That argument ignores Congress's clear and express directive that Section 3731(c) applies to all suits that were pending when the provision was enacted. "When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 280 (1994). Here, Congress "expressly prescribed the statute's proper reach" by providing that the amended Section 3731(c) "shall apply to cases pending on the date of enactment." FERA § 4(f)(2), 123 Stat. 1625. There is consequently no need for guesswork about what Congress intended or "resort to judicial default rules." *Landgraf*, 511 U.S. at 280.

In any event, Section 3731(c) is not properly viewed as retroactive legislation because it does not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. Petitioners' submission of false claims to the government was unlawful both before and after the 2009 amendments, and their potential civil liability for that past conduct has not been increased. The only question is whether, in a timely *qui tam* action based on those false claims, the government may intervene and file a new complaint that relates back to the relator's original complaint for statute of limitations purposes. And even with respect to that question, Section 3731(c) did not *change* the applicable law, but sim-

ply *confirmed* that the government's complaint in an FCA *qui tam* case relates back to the relator's timely-filed complaint.

c. Even if Section 3731(c) were viewed as retroactive, petitioners would be wrong in contending (Pet. 9-18) that the statute is unconstitutional as applied in this case. To the extent that petitioners rely (Pet. 10) on the Due Process and Just Compensation Clauses, the court of appeals declined to address those arguments "because they were raised in only two conclusory sentences." Pet. App. 11a. This Court does not ordinarily consider questions not passed upon by the court below, see *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) ("This Court * * * is one of final review, not of first view.") (internal quotation marks omitted); *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999); *United States* v. *Bestfoods*, 524 U.S. 51, 72-73 (1998), and there is no reason to depart from that ordinary practice here, in light of petitioners' failure to adequately press their arguments before the court of appeals.

To the extent that petitioners rely on the Ex Post Facto Clause, their challenge lacks merit because that Clause applies only to criminal or penal provisions. See *Collins* v. *Youngblood*, 497 U.S. 37, 41 (1990) ("[I]t has long been recognized by this Court that the constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them."); see also *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 533 (1998) (plurality opinion) ("In *Calder* v. *Bull*, this Court held that the *Ex Post Facto* Clause is directed at the retroactivity of penal legislation.") (citation omitted). Petitioners do not dispute that the Ex Post Facto Clause applies only to penal provisions, but they

argue that the FCA's "statutory scheme is 'so punitive either in purpose or effect as to negate'" any implication that the FCA is a civil statute. Pet. 12 (quoting *Smith* v. *Doe*, 538 U.S. 84, 92 (2003)).

The court of appeals correctly rejected that argument. Pet. App. 11a. This Court held in *Hudson* v. *United States*, 522 U.S. 93 (1997), that a system of monetary sanctions similar to the FCA was civil rather than punitive in nature. *Id.* at 103-105. Since *Hudson*, the two courts of appeals to consider the issue have held that the FCA is a civil rather than a criminal statute. See Pet. App. 11a; see also *United States* v. *Rogan*, 517 F.3d 449, 453-454 (7th Cir. 2008). Those decisions accord with the text of the FCA, which repeatedly refers to an action brought to enforce its provisions as a "civil action." 31 U.S.C. 3730(a), 3730(b), 3731(b); cf. *Eisenstein*, 129 S. Ct. at 2233, 2236-2237 (holding that, when the government does not intervene in an FCA *qui tam* suit, a notice of appeal must be filed within the 30-day period specified by Federal Rule of Appellate Procedure 4(a)(1)(A) for civil actions in which the government is not a party). Petitioners have not identified any evidence remotely resembling the kind of "clearest proof" that is "required to override legislative intent and conclude that an Act denominated civil is punitive" for purposes of the Ex Post Facto Clause. *Seling* v. *Young*, 531 U.S. 250, 262 (2001).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
DOUGLAS N. LETTER
STEVE FRANK
Attorneys

APRIL 2011